STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN BLACKWELL,

Plaintiff-Appellee,

vs.

DEAN A. FRANCHI and DEBRA FRANCHI

Defendant-Appellants.

Supreme Court No. 155413
COA Case No. 328929
Circuit Court Case No. 14-141562-NI

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DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Trial Court correctly held that a room which was unlit when the Plaintiff entered it of her own volition, constituted an open and obvious condition upon the land, thus warranting the granting of Defendants' motion for summary disposition.

The Trial Court says: Yes

The Court of Appeals says: No Answer

Plaintiff-Appellee says: No

Defendants-Appellants say: Yes

II. Notwithstanding the answer to the prior question, did the Plaintiff fail to present evidence of a genuine issue of material fact as to whether Defendants breached their duty to their social guests to warn of a hidden danger of an unreasonable risk of harm when Plaintiff entered the mudroom immediately before she allegedly fell.

The Trial Court says: Yes

The Court of Appeals says: No

Plaintiff-Appellee says: No

Defendant-Apellants say: Yes

STATEMENT OF FACTS

On December 14, 2013, the Defendants-Appellants, Dean and Debra Franchi, hosted a holiday party in their home. Among the guests at this party was the Plaintiff-Appellee, Susan Blackwell. As will be discussed in greater detail below, the events that transpired that evening do not constitute an actionable premises liability claim. Accordingly, the trial court was correct to grant the Defendants' motion for summary disposition.

The Franchis hosted the holiday party at their home on the evening of December 14, 2013. Appellee arrived at the home with fellow guests, Dave and Jane Brogan. (Appellants' Appendix at 143a) Soon after she arrived at the Franchi home, Appellee started to walk down the hallway toward the rear of the house where the other guests had gathered. Appellee had only been to the Franchi home on one prior occasion. (Appellants' Appendix at 143a-144a) As she made her way to where the other guests were located, Appellee stepped into a mudroom that adjoined the hallway. She had never been in the mudroom previously. (Appellants' Appendix at 144a) Appellee noticed that the mudroom was unlit before she stepped into it. (Appellants' Appendix at 144a) Although the mudroom was not lit, the appropriate light switch was on the wall immediately next to the entrance as Appellee walked into the room. (Appellants' Appendix at 145a, 375a-378a) Appellee made no effort to determine whether there was an available light switch to light the mudroom; she simply assumed that the mudroom floor surface was flat when she stepped into it. (Appellants' Appendix at 146a) Appellee claims that she did not see an eight-inch step in the mudroom, allegedly causing her to lose her balance, fall, and injure herself. (Appellants' Appendix at 147a)

PROCEDURAL HISTORY

Soon afterward, Appellee filed suit against the Appellants in Oakland County Circuit Court. Her complaint alleged claims for premises liability and public nuisance. (Appellants'

Appendix at 7a-12a) After the close of discovery, Defendants filed a motion for summary disposition pursuant to MCR 2.116 (C)(10). (Appellants' Appendix at 24a) The Honorable Colleen O'Brien heard the motion on June 3, 2015. Reading her decision from the bench, Judge O'Brian opined as follows:

> The Court also concludes there is no genuine issue of material fact that plaintiff cannot prevail on her premises liability claim under Count One.
>
> Plaintiff claims she was an invitee rather than a licensee as argued by the Defendant. Yet, even if this Court were to conclude that the plaintiff was an invitee, summary disposition still remains proper. With regard to invitees, a land owner owes a duty to use reasonably care to [protect] invitees from the unreasonable risk of harm posed by a dangerous condition on the owner's land; [*Hoffner v. Lanctoe*, 492 Mich 450, 460 (2012).]
>
> However, a land owner owes no duty to protect or warn against a danger that is open and obvious because such danger by its very nature apprises an invitee of the potential hazard, which the invitee may take reasonable steps to avoid.
>
> Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person, with ordinary intelligence, would have discovered it upon casual inspection. The Court concludes that reasonable minds could not differ that the alleged condition here was open and obvious. Moreover, there are no special aspects. Accordingly, Count One is dismissed. Okay, the Court will enter an order.

(Appellants' Appendix at 388a-389a) The Court entered the order granting Defendants' motion for summary disposition. (Appellants' Appendix at 392a) After a failed motion for reconsideration of that decision, Appellee's appeal to the Michigan Court of Appeals ensued.

After the parties briefed the issues, the Michigan Court of Appeals (Kelly, Gleicher, and Shapiro, JJ.) heard oral argument in Blackwell's appeal on December 13, 2016. On January 31, 2017, a divided panel issued its published decision in this matter. (Appellants' Appendix at 394a

et seq.) The Appellants now seek leave for further appeal for the reasons set forth in their application.

LEGAL ARGUMENT

I. Standard of Review

A trial court's ruling on a motion for summary disposition is reviewed *de novo*. *Epps v. 4 Quarters Restoration, LLC*, 498 Mich 518, 528 (Sept. 28, 2015)(citing *Costa v. Community Emergency Med. Servs., Inc.*, 475 Mich 403, 416 (2006)). Summary disposition is appropriate where, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116 (C)(10). In deciding the motion, the trial court must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v. Rozwood*, 461 Mich. 109, 121 (1999). Summary disposition may be granted if there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *West v. Gen. Motors Corp.*, 469 Mich. 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

II. The Franchis had no duty to warn the Appellee about the single step within the mudroom.

In the instant case, the Franchis had no obligation to issue any warning to the Appellee about the mudroom where she fell. The duty to warn a licensee about a condition upon the land is comprised of several considerations, all of which must be satisfied in order to trigger that obligation:

> A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Wymer v. Holmes*, 429 Mich. 66, 71 n. 1 (1987).] Typically, social guests are licensees who assume the ordinary risks associated with their visit. [*Preston v. Sleziak*, 383 Mich. 442, 451 (1970).]

Stitt v. Abundant Life Fellowship, 462 Mich 591, 596 (2000). These considerations are fully consistent with this Court's adoption of Section 342 of the *Restatement (Second) of Torts* in *Preston v. Sleziak*, 383 Mich 442 (1970).

> Section 342 of the *Restatement (Second) of Torts* provides as follows:
>
> A possessor of land is subject to liability for physical harm caused by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Id. Put simply, this section of the Restatement does not concern a duty to warn of <u>every</u> potentially hazardous condition on the land, but rather of an <u>unreasonable</u> risk of harm. Also see *Preston*, 383 Mich at 451 (social guests are not entitled to expect that the landowner will take precautions for her safety). As set forth in greater detail below, the Franchis had no obligation to warn Appellee of the step in the mudroom at the time of her fall.

A. Appellee was a licensee who assumed the ordinary risks associated with her visit.

As a licensee, Appellee assumed the ordinary risks associated with her visit. This includes assuming the risk of a single step inside the mudroom. That is, the risk associated with this step was "ordinary," rather than "unreasonable" as the Restatement requires. When examining this issue in the context of an open and obvious hazard in *Lugo v. Ameritech Corp.*, the majority of this Court distinguished the risk posed by an ordinary pothole from that posed by a thirty-foot-deep hole. *Lugo*, 464 Mich 512, 518-519 (2001). "[I]t appears to us that the degree

of potential harm from an open and obvious condition may, in some unusual circumstances, be the key factor that makes such a condition unreasonably dangerous." *Id.* at 518 n. 2.

In the present case, the only risk posed was from a single step that was approximately eight inches in height. This is readily distinguishable from *Abke v. Vandenberg*, 239 Mich App 359 (2000), which the concurrence below cited. (Appellants' Appendix at 398a) In *Abke*, the "unreasonably dangerous" condition was an unlit loading dock in a warehouse. Here, the alleged condition is a single step in a residential home. Even if there is some danger associated with a single step in a private residence, it does not rise to the level of an "unreasonably dangerous" condition. See *Restatement (Second) of Torts* § 293 (setting forth a four factor test for determining "magnitude of risk"). Unlike the facts in *Abke*, the risk of harm is significantly lesser and the number of people who are likely to face the risk of harm is significantly fewer with regard to a single step in a private home than it is in a warehouse loading dock. This approach is consistent with this Court's observation in *Bertrand v. Alan Ford, Inc.*, 449 Mich 606, 616-617 (1995):

> Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable.

This Court should recognize that the single step is not the "unreasonably dangerous" condition for a licensee that the warehouse loading dock is to the invitee. Because the step fails to meet the "unreasonably dangerous" standard, the Franchis were under no obligation to warn the Appellee of its presence and this licensee's premises liability claim should fail.

B. Appellee presented no evidence in the trial court that either of the Franchis knew or should have known that the mudroom was dark at the time immediately before Appellee fell.

Even if the step could be viewed as unreasonably dangerous, the Appellee offered no evidence in the trial court that the Franchis knew or should have known at the time that the Appellee fell that the mudroom was not lit. Without this evidence, there can be no finding that the Franchis had a duty to warn about the step. Without that finding, summary disposition is still appropriate, even if on grounds other than those set forth in the trial court's ruling. Consequently, the decision of the Court of Appeals is in error and should be reversed.

"A landowner owes a license a duty only to warn the licensee of **any hidden dangers the owner knows or has reason to know of**, if the licensee does no know or have reason to know of the dangers involved." *Stitt*, 462 Mich at 596 (emphasis added). In this case, in order to establish that the Franchis had a duty to warn the Appellee about the step in the mudroom, the Appellee had to present admissible evidence that the Franchis knew there was a "hidden danger" in the first place. Despite presenting the depositions of seven witnesses, including the parties to this action, Appellee never offered such evidence. This failure is fatal to her claim.

This issue of knowledge is of critical importance to determining whether a landowner is liable for a licensee's mishap on his or her property. Consider an alternative scenario in which the light illuminating the mudroom has burned out. If, by happenstance, a landowner turns on a light for his guests and, unbeknownst to the landowner, the light burns out, there is no liability under the Restatement or any of the published cases in the state of Michigan. However, if testimony were elicited that the light had burned out at some point prior to the party, and that the landowner knew this but opted not to replace it, then there might be liability and a denial of summary disposition would be appropriate.

But that is not the case here. There was no evidence below that suggested the Franchis knew or should have known that the condition in the mudroom was dark prior to Appellee's fall. Again, the Appellee failed to elicit testimony from any of the seven deposed witnesses to establish this. Dean Franchi testified that every light was on in the first floor of the house during the party. (Appellants' Appendix at 353a-354a) Although he heard the Appellee's fall, he did not see it happen. (Appellants' Appendix at 346a-347a) Meanwhile, Debra Franchi testified that she was in the basement at the time of Appellee's fall and did not learn of it until later. (Appellants' Appendix at 317a-318a) Appellee needed to offer admissible evidence contrary to this testimony in order to prevail.

However, although Appellee's counsel asked numerous questions of the witnesses about photographs of the area, no testimony was taken from any witness to establish the Franchis' knowledge of any "hidden danger" in the moments leading up to the Plaintiff's fall. Endia Simmons testified that Debra Franchi invited them to put their purses in the mudroom, but did not know if Ms. Franchi was in the kitchen or the dining room when she made this suggestion. (Appellants' Appendix at 173a) Thus, she is unable to establish that Debra Franchi knew the mudroom was unlit. This is inadequate to establish the Franchis' knowledge of a hidden condition. Ebony Whisenant testified that placing the purses in the mudroom was Appellee's idea; she did not testify as to the location of either of the Franchis immediately before Appellee's fall. (Appellants' Appendix at 198a) This is inadequate to establish the Franchis' knowledge of a hidden condition. David Brogan testified that he saw Appellee soon after she fell. At that time, the light was off in the mudroom, but he did not have any difficulty seeing the difference in elevation at the step. (Appellants' Appendix at 222a) This is inadequate to establish the Franchis' knowledge of a hidden condition. Jane Brogan, who arrived with Appellee, testified

that Dean Franchi took their coats upon their arrival, but that she, Dave Brogan, and Appellee did not make their way back to the area near the mudroom for "15 [to] 20 minutes." (Appellants' Appendix at 262a) Further, she testified that she had "no idea" whether the mudroom light was on when they arrived at the party. (Appellants' Appendix at 291a) This is inadequate to establish the Franchis' knowledge of a hidden condition. In summary, there is no witness who provided Appellee with the evidence necessary to show that the Franchis had the requisite knowledge to trigger an obligation to warn the Appellee about the step in the mudroom. Because Plaintiff could not produce this evidence in response to the motion for summary disposition, the trial court's grant of the motion was still appropriate.

RELIEF REQUESTED

For the foregoing reasons, the Defendant-Appellants, Dean Franchi and Debra Franchi, respectfully request that this Honorable Court grant this application for leave to appeal and, if the Court is disinclined to grant leave as to the first question, grant peremptory reversal as to the second question presented.

Respectfully Submitted,

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Dated: December 8, 2017

PROOF OF SERVICE

The undersigned certifies that on December 8, 2017 he served a copy of the foregoing document upon all counsel of record, via:

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_XX_ TrueFiling E-File and Serve

/s/ Scott Dennison
Scott Dennison